UNITED STATES GOVERNMENT

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

ALUTIIQ PROFESSIONAL SERVICES, LLC

Employer

and Case 20-RC-18005

CALIFORNIA FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1] the undersigned finds:

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[1] The parties stipulated that the exhibits and transcript of the hearing in Case 20-RC-17984 and the Decision and Direction of Election issued in that case should be incorporated into the record in the instant case.

On October 15, 2004, I issued a Decision and Direction of Election in Case 20-RC-17984, involving the Employer and Petitioner in the instant case. In my decision, I directed that an election be held in a bargaining unit which combined employees solely employed by Res-Care, Inc. d/b/a Treasure Island Job Corps Center (Res-Care) with employees jointly employed by Res-Care and the Employer. Neither Res-Care nor the Employer consented to the inclusion of its employees in the same unit with those of the other employer. Under *M.B. Sturgis*, 331 NLRB 1298 (2000), it was permissible to include employees solely employed by Res-Care in the same bargaining unit with employees jointly employed by Res-Care and the Employer without the consent of either employer. By Order dated November 10, 2004, the Board granted the Joint Employers' Request for Review of the Decision and

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer, an Alaska corporation, is engaged in the business of providing teaching and other services. During the 12-month period preceding the filing of the instant petition, the Employer provided services valued in excess of $50,000 to Res-Care, Inc., at its Treasure Island Job Corps Center located at Treasure Island in the State of California. The parties also stipulated, and I find, that Res-Care operates the Treasure Island Job Corps Center pursuant to a contract with the United States Department of Labor (DOL), and that during the same 12-month period, Res-Care derived revenues in excess of $1 million for services that it provided at the Treasure Island Job Corps Center. The parties further stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act and that it

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Direction of Election issued case 20-RC-17984 and as a result, the ballots at the election conducted on November 10, 2004, were impounded.

On November 30, 2004, the Board issued an Order remanding Case 20-RC-17984 to me for further appropriate action consistent with its decision in *Oakwood Care Center*, 343 NLRB No. 76, Slip Op. (November 19, 2004). In *Oakwood Care Center*, the Board overruled *M.B. Sturgis*, and held that a bargaining unit that combines employees who are solely employed by a user employer and employees who are jointly employed by a user employer and a supplier employer constitute a multi-employer bargaining unit and may be found to be appropriate only with the consent of both the user and supplier employers.

Because the election ordered in Case 20-RC-17984, was conducted in a unit which included employees solely employed by Res-Care with those employed jointly by Res-Care and the Employer, and because neither employer had consented to the inclusion of its employees in the same unit with those of the other, under the Board's decision in *Oakwood Care Center* such a unit was not an appropriate unit for collective-bargaining purposes. In these circumstances, on December 6, 2004, I ordered that the election in Case 20-RC-17984, be set aside and considered a nullity, and the record in that case be reopened and the case remanded to take additional evidence regarding the appropriateness of the petitioned-for unit, as well as other issues that had not been developed at the hearing and had not been addressed in my decision. However, on December 15, 2004, the Petitioner withdrew the petition filed in Case 20-RC-17984, and filed the instant petition seeking to represent a unit comprised solely of employees employed by the Employer at the Treasure Island Job Corps Center. On the same date, the Petitioner filed a petition in Case 20-RC-18004 seeking to represent a unit comprised solely of employees employed by Res-Care at the Treasure Island Job Corps Center.

will effectuate the purposes and policies of the Act to assert jurisdiction over the Employer in this case.

At the hearing, the Employer's counsel represented that the Employer was preserving the argument it presented in Case 20-RC-17984, that the Board should not assert jurisdiction over it and should overrule *Management Training Corp.*, 317 NLRB 1355 (1995), and return to the standard previously applied by the Board in *Res-Care*, 280 NLRB 670 (1986). As noted above, in my Decision and Direction of Election in Case 20-RC-17984, I rejected the Employer's argument in this regard, and the Board, in an unpublished Order, dated November 30, 2004, declined to grant the Employer's request for review on this issue. The Petitioner takes the position that the Employer should not be permitted to relitigate this issue in the present case. However, as the instant matter involves a new petition for an election in a unit different from that sought in Case 20-RC-17984, albeit involving the same Employer and Petitioner, I make no determination regarding whether it is proper to litigate this issue in the instant proceeding, and I leave it to the Board to decide whether it will rehear the Employer's jurisdictional argument. Assuming that it does so, I am restating my findings and decision from Case 20-RC-17984, with regard to this issue.

As indicated above, the parties have stipulated to the inclusion in the instant record, of the exhibits and transcript of the hearing in Case 20-RC-17984, including the Decision and Direction of Election issued in that case and the stipulation of facts pertaining to the jurisdictional issue as set forth in that case. The Employer contends it is exempt from the Board's jurisdiction because of the control exerted over its operations and labor relations decision-making by the DOL, which prevents it from being able to

engage in meaningful collective bargaining with the Petitioner. In this regard, the Employer requests that I overrule the Board's decision in *Management Training Corp*., *supra,* and return to the standard previously applied by the Board in *Res-Care, supra*. Based on the following findings of fact and for the reasons discussed below, I find that the Board has jurisdiction over the Employer and I refuse to dismiss the petition.

Facts. The parties stipulated, and I find, that the manner in which the Treasure Island Job Corps Center is administered by the DOL is similar in all respects to the factual determinations made by the Board in *Res-Care, Inc., 280* NLRB 670 (1986). This stipulation does not, however, extend to the legal determinations made by the Board or the Board's interpretation of federal law, but only to the factual determinations made in that case.

Analysis. In *Management Training Corp*., *supra,* the Board adopted the following two-prong test to determine whether it would assert jurisdiction over private sector employers with close ties to an exempt government entity: (1) Does the employer meet the definition of "employer" under Sec. 2(2) of the Act? and (2) Does the employer meet the Board's statutory and monetary jurisdictional standards? The Board also held that it would not analyze whether a private sector employer is a joint employer with the exempt government entity in order to determine jurisdiction. *Id*. at 1358 fn. 16. In so doing, the Board reasoned that although it has no jurisdiction over a government entity and cannot compel it to sit at the bargaining table, a private employer is capable of engaging in effective bargaining regarding terms and condition of employment within its control. *Id*. at 1358, fn. 16.

In *Management Training*, the Board overruled its decision in *Res-Care, Inc.*, 280 NLRB 670 (1986), and rejected the test adopted therein pursuant to which the Board examined the control over essential terms and conditions of employment retained by both the employer and the exempt government entity and determined whether the employer is capable of engaging in meaningful collective bargaining.[2] In so doing, the Board described the *Res-Care* test as "unworkable and unrealistic." Id. 317 NLRB at 1355. The Board recently reaffirmed *Management Training* and rejected a return to the *Res-Care* standard in *In re Jacksonville Urban League, Inc.*, 340 NLRB No. 156 (December 18, 2003). The Sixth, Fourth, and Tenth Circuits have upheld the *Management Training* doctrine. *Pikeville United Methodist Hospital of Kentucky v. NLRB*, 109 F.3d 1146 (6th Cir. 1997); *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997); *Aramark Corp. v. NLRB*, 156 F.3d 1087 (10th Cir. 1989). The Employer urges that I overrule *Management Training* and apply the *Res-Care* test to the instant proceeding. However, the only evidence proffered for this proposition is the above-noted stipulation that the facts of this case are similar in all respects to those in *Res-Care*, the case in which the Board specifically overruled in *Management Training.* The Employer has stipulated

[2] In *Res-Care*, the Board declined to assert jurisdiction over the employer, which operated a residential job corps center in Indiana under contract with DOL, finding that DOL imposed direct control over the Employer's wages and benefits by the requirement that DOL approve the employer's initially submitted budget; approve the employer's wage ranges, sick leave and vacation pay; and approve any changes in wage and benefit levels that had been previously approved by DOL. In that case, the Board noted that DOL required that the employer's wage rates be based on area standards and not exceed by 10% or more what the employees received in their former positions. Because of these direct controls over wages and benefits exerted by DOL in *Res-Care*, the Board concluded in that case that DOL's control over such essential terms and conditions of employment made meaningful collective bargaining by the employer impossible, and it declined to assert jurisdiction over the employer. The Employer in the instant case, as set forth above, has stipulated that the manner in which the Treasure Island Job Corps Center is administered by DOL is similar in all respects to the factual determinations regarding the administration of the job corps center in *Res-Care.*

that it satisfies the Board's discretionary jurisdictional standards and does not contest its status as an employer under the Act. Rather, it only repeats the same argument asserted in *Res-Care* to show the degree of control exercised over its operation by the DOL.

I am obliged to apply current Board law, which is set forth in *Management Training,* and reaffirmed by the Board in *In re Jacksonville Urban League, Inc.* As noted above, in the Decision and Direction of Election issued in Case 20-RC-17984, I rejected this argument, and the Board in its Order declined to grant the Employer's request for review on this issue. The Employer has presented no additional evidence nor raised any new legal argument to challenge that precedent. Accordingly, I find that the assertion of jurisdiction over the Employer is clearly warranted, and I decline to dismiss the petition.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The parties stipulated, and I find, that there is no contract bar to this proceeding.

5. The parties stipulated, and I find, that the following unit is an appropriate unit for collective bargaining purposes:

> All full-time and regular part-time college program coordinators, administrative assistants, IT specialists, instructors, testing specialists, STARS specialists, accountability clerks, attendance clerks, and VST coordinators employed by the Employer at the Treasure Island Job Corps Center, located at Treasure Island, California, California; excluding all other employees, employees of Res-Care, Inc., d/b/a Treasure Island Job Corps Center, managers, confidential employees, guards and supervisors within the meaning of the Act.

Evidence was presented at the hearing regarding whether the academic instructors, vocational instructors, STARS specialists, VST coordinators, college program

coordinators and testing specialists are professional employees who must be given the opportunity to vote in a self-determination election following the procedures of *Sonotone Corp*., 90 NLRB 1236 (1950). The Employer contends that none of these employees are professional employees. The Petitioner takes the position that the academic instructors may be professional employees, but does not appear to dispute that the other positions are nonprofessional. For the reasons discussed below, I find that the academic instructors, vocational instructors, STARS specialists, VST coordinators, college program coordinators and testing specialists are not professional employees and that a *Sonotone* election is not warranted in this case.

The Academic Instructors. The Employer employs approximately 20 academic instructors. Academic instructors are required to have a bachelor's degree and a California teaching credential, which requires an additional 30 units/semester hours in the theory/psychology of teaching and in the substantive area that they are teaching, or in the alternative, they must obtain a waiver from DOL pursuant to which they agree to obtain their teaching credential by a certain date. Approximately half the Employer's instructors are credentialed and half are not credentialed but have waiver agreements. The job of the academic instructors is to provide direct classroom instruction to students to prepare them to take the GED's, which are high school equivalency tests that can be taken to obtain a high school degree in lieu of regular classroom instruction. The record reflects that there are GED tests in five subjects that must be passed by students in order to be awarded a high school degree. Each of the academic instructors teaches between one and three of these GED subjects, which include math, reading, social studies, science and writing. The record discloses that the academic instructors "teach to the test," which means that

they teach what is necessary to enable students to pass the GED. They also administer tests to the students in these subjects. They do not grade students and they do not determine the teaching curriculum, which is dictated by the GED tests. Students who opt for obtaining a regular high school diploma through regular classroom instruction are taught by charter school instructors who are not employed by the Employer.

Vocational Instructors. The Employer employs about 18 or 19 vocational instructors who teach students in various vocational areas, including the building/construction trades; child care; business, including accounting and word processing; graphic design; driver's education; culinary arts; and for jobs such as certified medical assistant. The prerequisites for hire as a vocational instructor include a vocational teaching credential issued by the State of California, five years experience in the trade being taught, and having taken course work in how to teach the curriculum. However, the record shows that the Job Corps has accepted vocational instructors based only on verifications that they have spent a certain amount of time working in the trade they are going to be teaching. The building/construction trades instructors are hired and paid with the cooperation of unions, which are involved in the hiring process. The record does not disclose the pay rate or the benefits for persons in the position of vocational instructor.

The STARS Specialist. STARS is a chartered school in Maryland, which offers a computerized study program that enables students to obtain a high school diploma on the internet. The Employer operates a computer laboratory where students take the courses offered by the STARS program to obtain their high school degree. The job of the STARS specialist is to monitor the students as they work on the computers; to protect the

computers from misuse; to provide students with assistance as they proceed through the program; to act as a resource person; to schedule students in the program; and to handle the paperwork involved in the STARS application for a high school diploma. The position does not require a license or a certification, although the person occupying the position at the time of the hearing had a bachelor's degree in journalism and was working on a teaching credential at the University of California at Berkeley. The record does not disclose the pay rate or the benefits for the person in this position.

The VST Coordinator. The VST coordinator position does not require a degree or certification. The person in this position handles vocational skills training, teaching the students how to do work in a trade, such as masonry, carpentry or electrical work. The record does not disclose the pay rate or the benefits for this position.

The College Program Coordinator. The Employer requires a college degree for the position of college program coordinator. However, the record does not disclose whether there is any kind of certification or licensing requirement for the position. The college program coordinator orients students about college requirements and financial aide for colleges, and administers placement tests to determine what level of reading and math instruction students will initially receive in the program. In addition, the persons in this position maintain student testing records and daily attendance records. The pay rate and benefits for this position are not disclosed in the record.

The Testing Specialist. The testing specialist is responsible for administering a standardized test required of every student who enters a Job Corps program, which determines what courses they will be eligible to take while in the program. The testing

specialists also maintain testing records for this test. However, they do not instruct students. No degree, certification or license is required for this position.

Analysis. As indicated above, the Employer takes the position that none of the employees in these classifications are professional employees and the Petitioner asserted that the academic instructors could be professional employees but does not appear to contest the Employer's position as to the professional status of the other positions. For the following reasons, I find that the academic instructors, vocational instructors, STARS specialists, VST coordinators, college program coordinators and testing specialists are not professional employees within the meaning of the Act.

Section 2(12) of the Act defines a professional employee as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who has completed the courses of specialized instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Section 2(12) defines a professional employee in terms of job content and responsibilities that the individual performs, rather than the individual's academic or technical training, job title or compensation. See *Lincoln Park Zoological Society*, 322 NLRB 263 (1996); *Aeronca, Inc*., 221 NLRB 326 (1975); Loral Corp., 200 NLRB 1019 (1972); *Chesapeake Telephone Co*., 192 NLRB 483 (1971); *Westinghouse Electric Corp*.,

163 NLRB 723, 726 (1967). The fact that a group of employees is predominantly composed of individuals possessing a degree in the field to which the profession is devoted, may tend to show that that the work they perform requires knowledge of an advanced type. See *Western Electric Co*. 126 NLRB 1346, 1348-1349 (1960). However, this factor is not controlling and all circumstances relevant to the inquiry must be examined. See *Express News Corp*., 223 NLRB 627 (1976).

The record reflects that although the academic instructors are required to have a bachelors degree and a teaching credential, their job is only to instruct students to enable them to pass the GED. The academic instructors do not determine the curriculum, which is dictated by the GED. For these reasons, even though they are required to have a "prolonged course of specialized intellectual instruction and study," as described in Section 2(12), the record does not support that their work involves "the consistent exercise of discretion and judgment" required for a finding of professional employee status. See *Lincoln Park Zoological Society*, *supra,* 322 NLRB at 267; *Twin City Hospital Corp.*, 304 NLRB 173, 174-175 (1991); *Norton Community Hospital,* 291 NLRB 1174, 1175 (1988); *Express News Corp*., *supra*, 223 NLRB at 630; *Aeronca, Inc*., *supra,* 221 NLRB at 329.

With regard to the vocational instructors, the record reveals that while they must possess a vocational teaching credential, their experience and education largely involves building/construction and other trade and technical areas, which is generally not work of a nature performed by professional employees. *Syosset General Hospital*, 190 NLRB 304 (1971) (pharmacists and technicians not found to be professional employees); *Safeway Stores*, 174 NLRB 1274 (1969) (computer programmers not found to be professional

employees); *Chrysler Corporation*, 154 NLRB 352 (1965) (manufacturing engineers not found to be technical employees). Nor is there any evidence that they consistently utilize professional discretion and judgment in performing their work. Therefore, I find that the vocational instructors are not professional employees within the meaning of the Act.

With regard to the STARS specialists, the record shows that these employees monitor students in a computer laboratory who are taking the STARS on line program to obtain their high school degree and handle administrative matters associated with that program. There is no evidence that they are required to have any license, certification or degree of higher learning or that they exercise independent judgment of a professional nature in their job. I therefore find that they are not professional employees.

With regard to the VST coordinators, the record does not disclose any prerequisites for persons in this position or that they exercise any type of independent judgment based on professional training or educational requirements, and I therefore find that the VST coordinators are not professional employees.

With regard to the college program coordinators, the record contains no evidence that they are required to possess any educational degree or training beyond a college degree. These persons handle orientations and administer placement tests to students and handle paperwork on attendance and other student records. There is no evidence that their work requires them to exercise independent judgment. Accordingly, I find no basis for concluding that the employees in this position are professional employees.

Finally, with regard to the testing specialists, the record discloses that there is no requirement for any specialized training or certification for persons in this position. They do not teach students or perform any other work that requires independent judgment of

the type exercised by professional employees. Therefore, I do not find the testing specialists to be professional employees.

In sum, I find that the academic instructors, vocational instructors, STARS specialists, VST coordinators, college program coordinators and testing specialists are not professional employees, and I am not ordering a *Sonotone* election in this case. *Lincoln Park Zoological Society, supra; Twin City Hospital Corp, supra*; *Norton Community Hospital, supra*; *Express News Corp., supra*; *Aeronca, Inc., supra*.

Accordingly, I am directing an election in the following unit, which has been stipulated to by the parties, and which I find to be an appropriate unit for collective bargaining purposes:

> All full-time and regular part-time employees, including college program coordinators, administrative assistants, IT specialists, instructors, testing specialists, STARS specialists, accountability clerks, attendance clerks, and VST coordinators employed by the Employer at the Treasure Island Job Corps Center, California; and excluding all other employees, employees of Res-Care, Inc., d/b/a Treasure Island Job Corps Center, managers, confidential employees, guards and supervisors within the meaning of the Act.

DIRECTION OF ELECTION[3]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.

[3] The Employer does not contest the inclusion of substitute instructors in the unit. Further, the parties agree that the *Davison-Paxon* (185 NLRB 21 (1970)) formula for determining voter eligibility should be applied in this case. The Petitioner has requested, however, that I adjust the time frame for applying this formula to take into account the holiday period from December 16, 2004, to January 4, 2005, when the Employer was not providing classroom instruction. I have considered the representations made by the Petitioner's counsel in this regard, but find no basis to alter the standard period for application of the *Davison-Paxon* formula.

Eligible to vote are those in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by CALIFORNIA FEDERATION OF TEACHERS, AMERICAN FEDERATION OF TEACHERS, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of *voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB. Wyman-Gordan Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with

the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before February 4, 2005. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 11, 2005.

DATED at San Francisco, California, this 28th day of January, 2005.

/s/ Robert H. Miller
Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
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San Francisco, CA 94103-1735